APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2052 and 80-2053

UNITED STATES OF AMERICA

v.

FRIEDLAND, DAVID,
Appellant in No. 80-2052

UNITED STATES OF AMERICA

v.

FRIEDLAND, JACOB
Appellant in No. 80-2053

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Criminal Nos. 79-00246-01 and 79-00345-02)

Argued July 23, 1981

Before: ADAMS, HUNTER, and SLOVITER, *Circuit Judges*

Opinion filed October 1, 1981

Raymond A. Brown (Argued)
Raymond M. Brown
Brown, Brown, Furst, P.C.
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Franklin M. Sachs (Argued)
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Appendix A

Samuel A. Alito, Jr. (Argued)
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Attorneys for Appellee

OPINION OF THE COURT

HUNTER, *Circuit Judge*.

1. The appellants, David and Jacob Friedland, were convicted of soliciting and accepting kickbacks in their capacity as general counsel to the Teamsters' Local 701 Pension Fund in North Brunswick, New Jersey ["the Fund"], in violation of 18 U.S.C. §1954 (1976);[1] obstructing justice by soliciting another to give false testimony before the grand jury investigating the kickbacks, in violation of 18 U.S.C. §1503 (1976);[2] and filing false income tax statements for the years in which they re-

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1. 18 U.S.C. §1954 provides:

Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

2. 18 U.S.C. §1503 provides:

Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

ceived the kickbacks, in violation of 26 U.S.C. §7206(1) (1976).[3]

2. This appeal raises the following issues:

a) Must appellants be shown to have duties with respect to the pension fund in order to come within the scope of 18 U.S.C. §1954? Must appellants have committed any acts in order to be found to have solicited or accepted payment "because of" their actions, decisions, or other duties relating to the Fund?

b) Did the trial court err in refusing to conduct an evidentiary hearing concerning the alleged loss or destruction of discoverable evidence by the Government?

c) Did the trial court err in allowing certain exhibits in the jury room?

Did the trial court err in finding that the Government's opening statements were not prejudicial?

Did the trial court err in permitting the introduction of evidence concerning appellants' secret Swiss bank account?

Did the trial court err in refusing to conduct an inquiry into appellants' allegation that the jury improperly considered appellants' failure to testify?

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3. 26 U.S.C. §7206(1) provides:

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

d) Must an indictment charging a violation of 18 U.S.C. §1503 for obstruction of justice, which is based upon the solicitation of false statements, specify the false statements allegedly solicited?

e) Did the trial court err in denying appellants' motion for a new trial?

3. We have reached the following conclusions:

a) Implicit in the finding that appellants were counsel to the Fund is a finding of sufficient duties to bring them within the scope of §1954. Appellants need not have committed any acts in order to violate the "because of" provision of §1954; it is sufficient that they accepted payment with the stated purpose of exercising their influence over the Fund.

b) Appellants failed to show the existence or relevance of the documents in question; thus, an evidentiary hearing was not warranted.

c) The trial court did not err in finding that the presence of challenged exhibits in the jury room, and the Government's opening statements, did not prejudice appellants.

It was not arbitrary or irrational for the trial court to find that the probative value of the Swiss bank evidence outweighed the danger of prejudice therefrom.

The trial court did not err in finding that the inquiry requested by appellants into jury deliberations was prohibited by Fed. R. Evid. 606(b).

d) An indictment for obstruction of justice need not meet the same specificity requirements as an indictment for making false statements, even though the obstruction of justice count is based upon solicitation of false statements.

e) The trial court carefully considered all the evidence on the record before denying the motion for a new trial. We cannot say that the court abused its discretion in doing so.

4. Therefore, we affirm the judgment of the trial court in all respects.

FACTS

5. David Friedland and his father, Jacob, are attorneys who served for many years, up to and including 1976, as general counsel to the pension fund maintained by Teamsters' Local 701 of North Brunswick, New Jersey. Trial Transcript at 63. That fund was an employee benefit plan within the meaning of 18 U.S.C. §1954. In their role as counsel, the Friedlands were obligated to consult with the trustees of the Fund when requested, and were required to attend and provide advice at all trustees' meetings. Although the trustees employed an investment manager to oversee investment of the Fund's assets, the trustees retained significant authority over investments. The trustees had the responsibility for selecting the manager and for deciding, when the management contract expired, whether to continue the manager's services or to seek a replacement. The trustees also had complete discretion to direct particular investments at any time.

6. Until 1974, the Fund's investments had been managed by Lionel D. Edie & Co. Because of their dissatisfaction with the return on the Fund's investments, the trustees decided in late 1973 to seek a new investment manager. David Sack, the administrator of the Fund, was responsible for presenting potential managers to the trustees. Sack invited a few companies to two trustees' meetings, where they presented their proposals for investment of the Fund's assets. At the second of these meetings, David Friedland introduced A. Stone

Douglass, who represented Unicorn Pension Management Associates, a relatively inexperienced investment firm. Friedland stated that Douglass was an "excellent" investment counselor who had received a "fantastic" rate of return on investments he had made. Trial Transcript at 1247. David Sack had never met Douglass, nor had he invited Unicorn to make a presentation to the trustees at any meeting.

7. Soon after this meeting was held, Sack was informed that Unicorn had been selected by the trustees as the new investment manager. After Unicorn had served for some time as investment manager, A. Stone Douglass left Unicorn and formed his own firm, Douglass Embry Co. Shortly thereafter, the trustees transferred management of the Fund's investments from Unicorn to Douglass Embry Co.

8. In February 1975, the Friedlands were introduced to Barry Marlin, a California businessman, at a party given by Kate Edelman, a mutual friend. At that time, Marlin was seeking financing for one of his business ventures, Dunhill Brown Corp. To obtain financing, Marlin had arranged for a public offering of $3.5 million in Dunhill Brown debentures. When Marlin mentioned the upcoming public offering to David Friedland, Friedland replied, "I have a client that could do a loan like that if you are interested." Trial Transcript at 174.

9. Marlin initially declined Friedland's offer, but later arranged to meet with him in Kate Edelman's New York apartment in February or March of 1975 to discuss the loan. Marlin requested a $3.5 million loan for a term of four or five years at ten percent interest; Friedland would agree only to a term of one or two years at twelve percent interest. David Friedland then disclosed that the source of the loan was a pension fund for which he served as general counsel, and he stated that he would require a ten percent kickback. Marlin agreed to pay a

nine percent kickback ($315,000). Friedland insisted that Marlin pay the kickback in cash, in $100 bills, and that the money be withdrawn from sources outside the United States banking system. Marlin stated that he would use a bank under his control, the First Kensington Bank of the Cayman Islands.

10. Shortly thereafter, Marlin met with both David and his father, Jacob Friedland. After reviewing the terms of the loan, Jacob Friedland informed Marlin that the loan could be renewed every two years in exchange for an additional nine percent kickback. Jacob Friedland emphasized that the funds used to pay the kickback could not be taken from the loan proceeds, but would have to be drawn from sources outside the United States banking system.

11. After the meeting with representatives of Unicorn, Marlin expressed concern to David Friedland that Unicorn might not approve the loan to Dunhill Brown Corp. Friedland reassured Marlin, stating that "[i]f they don't give you the loan we'll take the fund away from them." Trial Transcript at 196.

12. In April 1975, David Friedland informed Marlin that the loan had been approved on the terms to which they had previously agreed. Friedland also told Marlin that the kickback would have to be paid on the same date as the closing, April 25, at a location outside the United States. Friedland suggested his condominium in Freeport, Bahamas, as a suitable site for payment of the kickback.

13. Marlin arranged to have his brother, Herbert, attend the closing of the loan in New York, on April 25, 1975. On the morning of April 25, Barry Marlin met David Friedland at Friedland's condominium in Freeport, Bahamas. After confirming that the loan proceeds had been paid, Marlin emptied his BOAC flight bag, containing the $315,000 kickback in one hundred dollar bills, onto the living room floor, where Friedland counted it.

14. In early May 1975, Marlin asked David Friedland whether the Fund could lend him an additional amount not greater than $1,000,000 so that he could open a business in New York; he added that the funds would not be needed until the end of the year. Friedland said that such a loan could be extended on the same terms as the first, provided that Marlin paid a nine percent kickback. Marlin did not actually request that the loan be made at this time.

15. In June 1975, David Friedland informed Marlin that in the future, instead of receiving a percentage of all loans arranged, he and his father wanted fifty percent of the profits of any business to which a loan was granted. David Friedland then gave Marlin what Friedland termed "information" Marlin "might need for the future." Trial Transcript at 263. Friedland revealed that he and his father had an account in the Banque de L'Indochine et de Suez, in Lausanne, Switzerland, under the code name Stephen Sagleo.[4] Friedland also gave Marlin the name, address, and phone number of the Friedlands' Swiss banker, Alain Peytral.

16. In the following months, Marlin attempted to obtain loans from the Fund for several business ventures. None of these loans was finalized. During this same period, Marlin was also seeking depositors for his First Kensington Bank, in order to improve its balance sheet.

17. On July 16, 1975, David and Jacob Friedland, who had complained of the low rate of interest paid by their Swiss bank, transferred $1,050,000 of their personal funds to the First Kensington Bank's accounts at two London banks. The First Kensington Bank used these funds to purchase certificates of deposit paying 8.5 percent interest, and then endorsed the certificates back to the Friedlands' Swiss bank, the Banque de

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1. The name "Sagleo," according to testimony, was arrived at by combining David Friedland's astrological sign, "Sagittarius," with his wife's sign, "Leo." Trial Transcript at 264.

L'Indochine et de Suez. This transaction apparently allowed the First Kensington Bank to carry the certificates on its balance sheet, and allowed the Friedlands to earn higher interest on their funds while retaining the security afforded by a Swiss bank. The Friedlands' personal funds remained on deposit at the London banks until March 19, 1976, and earned in excess of $60,000 in interest.

18. David Friedland's federal income tax return for 1975 listed adjusted gross income of $26,692 and interest income of $21. His 1976 form listed adjusted gross income of $28,134 and interest income of $0. Jacob Friedland's 1975 federal income tax return listed adjusted gross income of $42,124 and interest income of $13. His return for 1976 listed adjusted gross income of $30,623 and interest income of $14.

19. In October 1975, Marlin requested a loan for his new business in New York, according to the terms he had discussed with David Friedland in May 1975. Marlin said that he would need $500,000. The Friedlands agreed that the loan would be granted in December, in exchange for a kickback of nine percent, or $45,000. In December, Marlin gave David Friedland the $45,000 in cash on the same day the loan was scheduled to close.

20. In January 1976, Marlin's financial empire began to collapse, and he discovered that he was under investigation by the Securities Exchange Commission. At about this time, David Friedland told Kate Edelman about the kickbacks that had been received from Marlin, and expressed fear that Marlin might report the kickbacks to the authorities.

21. In May 1977, Marlin was indicted in California for fraudulent business practices. In July 1977, he was indicted on similar charges in Illinois. He pleaded guilty in both jurisdictions, and was sentenced to five years imprisonment in Illinois, and to a concurrent ten year term in California. In early May 1979, Marlin began cooperat-

ing with the government and revealing the details of his kickbacks to the Friedlands.

22. On July 4, 1979, the Friedlands met with Kate Edelman and told her that Marlin had "talked." They outlined exactly what they wanted her to tell the authorities when she was contacted. In reference to the first loan and kickback, they asked her to say that she had seen a suitcase with $750,000 cash in it, part of which Marlin was planning to take to his bank in the Cayman Islands, and part of which Marlin intended to use to buy a condominium in the Bahamas. The Friedlands offered to pay any legal expenses Edelman incurred, and discussed the possibility of obtaining transcripts of any grand jury hearings to enable Edelman to "take the onus" off Marlin resulting from any incriminating testimony given by others. Edelman was contacted by the FBI later the same day, and was served with a grand jury subpoena on the following day.

PROCEDURAL HISTORY

23. In October 1979, the Grand Jury for the District of New Jersey returned a multicount indictment charging appellants David Friedland and Jacob Friedland with one count of conspiracy to solicit and receive kickbacks, 18 U.S.C. §371 (1976); two counts of soliciting and receiving kickbacks, 18 U.S.C. §1954 (1976); one count of traveling and causing to travel with intent to promote and facilitate bribery, 18 U.S.C. §1952 (1976); and one count of endeavoring to obstruct justice, 18 U.S.C. §1503 (1976). In January 1980, the grand jury returned a superseding indictment which, in addition to the charges listed above, charged each appellant with two counts of making false income tax returns, 26 U.S.C. §7206(1) (1976).

24. Before trial, the appellants moved to dismiss Counts 2, 3, 4 and 5 of the indictment, on the ground

that, by failing to allege any duty, decision, or action on their part as the basis for the payment of the kickback. Counts 2, 3 and 4 failed to charge an essential element of the crimes. The appellants also argued that the charges in these counts, particularly the obstruction of justice charge in Count 5, were not specific enough to be met, or to prevent double jeopardy in future prosecutions. The appellants also moved pursuant to Fed. R. Crim. P. 14 to sever the income tax fraud counts from the remainder of the indictment, in order to prevent prejudice from joinder. The trial court denied these motions.

25. Following trial, the jury returned a verdict of guilty against both Jacob and David Friedland on all counts. The appellants filed a motion for a judgment of acquittal on all counts, pursuant to Fed. R. Crim. P. 29(c), and in the alternative, for a new trial pursuant to Fed. R. Crim. P. 33. The trial court denied appellants' motions.

DISCUSSIONS

Scope of 18 U.S.C. §1954

26. Appellants were convicted under 18 U.S.C. §1954, which provides in pertinent part:

> Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

The trial court, in his instructions to the jury, recognized that there are two prongs to §1954: one may be convict-

ed for receiving a kickback (a) "because of" or (b) "with intent to be influenced with respect to" any actions, decisions, or other duties relating to the plan involved.

27. Appellants contend that the trial court erred in failing to instruct the jury that it must find that appellants had some capacity to influence the granting of the loan. Appellants cite this court's decision in *United States v. Palmeri*, 630 F.2d 192 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 101 S. Ct. 1484 (1981), in support of this proposition. They contend that *Palmeri* requires a finding that appellants had a demonstrated capacity to control or influence the issuance of loans. In so doing, appellants read too much into the *Palmeri* decision. In *Palmeri*, this court held that one could be among the class of persons whose actions are proscribed by §1954 even though one has no fiduciary relationship to the employee benefit plan. 630 F.2d at 199-200. The central issue in that case was whether one must have a capacity *directly* to influence the employee plan in order to violate §1954. *Palmeri* clearly stands for the proposition that capacity to influence *indirectly* is sufficient to support conviction under §1954.[5] The jury in the instant case found that appellants were counsel to the Fund.[6] Appellants' status as counsel to the Fund is sufficient to place them in the class of those persons capable of violating either prong of §1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. Therefore, the failure

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5. The *Palmeri* court stated: "The more reasonable construction of [§1954] is one that includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund." 630 F.2d at 199.

6. The trial court instructed the jury that it must find that appellants were counsel to the Fund in order to render a guilty verdict under Count 3 of the indictment. Appendix at 351. Appellants were found guilty under Count 3.

to instruct the jury to make a specific finding of "capacity" was not error.

28. Appellants further contend that the trial court erred in its instructions regarding the "because of" prong, and, because the jury's guilty verdict may have rested on either prong, the verdict must be overturned. *See United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Appellants claim that the trial court erred in charging the jury:

> Furthermore, you need not find the defendants actually influenced the granting of the loans to find they received the cash payments because of his [*sic*] actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

Appendix at 353. Appellants argue that, in order to come under the "because of" prong, they must be shown to have actually taken some action in return for the kickback.

29. This court confronted a similar argument in *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978). Niederberger was charged with receiving an illegal gratuity in violation of 18 U.S.C. §201(g), which provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or *because of* any official act performed or to be performed by him . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(Emphasis supplied.) We rejected Niederberger's claim that the indictment must allege some quid pro quo for the gift received. Noting that §201(c)(1) substitutes the phrase "in return for" for "because of," we stated:

> It is clear, then, that §201(c)(1) requires as one of its elements a quid pro quo. In fact, we find this to be the primary distinction between subsections (c)(1) and (g). . . .
>
> Thus, we find it unnecessary for the Government to allege in an indictment charging a §201(g) offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A quid pro quo is simply foreign to the elements of a subsection (g) offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 68-69.

30. We find this analysis equally applicable when it is counsel to a pension fund, and not public officials, who receive what the *Niederberger* court called an "illegal gratuity." *Id.* We believe the trial court was correct in not requiring that any action actually be taken in order for the jury to find that the kickback was received "because of" actions, decisions, or other duties relating to the Fund. So long as appellants were counsel to the Fund, and received the kickback (a) because of that status, which gave them at least ostensible power to exercise influence, or (b) with the purpose of exercising the influence they either actually or ostensibly had over de-

cisions regarding the Fund, then they need not be shown to have actually exercised such influence. If actual exercise of influence were a prerequisite to a violation, then anyone who could potentially influence a future decision concerning a pension plan would be free to solicit kickbacks so long as he ultimately took no action to influence the decision. Such a construction is inconsistent with the broad purpose of §1954. *See United States v. Palmeri*, 630 F.2d 192, 199-200 (3d. Cir. 1980), *cert. denied*, —— U.S.——, 101 S. Ct. 1484 (1981).

31. When counsel to an employee pension fund take a kickback for the stated purpose of exercising their influence over the fund, then their actions come within the "because of" prong of §1954.

Denial of the Evidentiary Hearing

32. Appellants contend that the trial court erred in denying their motion for an evidentiary hearing to determine whether the government lost or destroyed certain discoverable evidence. The evidence in question falls into two categories: (1) Barry Marlin's personal financial records; and (2) the records of the First Kensington Bank of the Cayman Islands.

33. This court has held that "[l]oss or destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process." *Virgin Islands v. Testamark*, 570 F.2d 1162, 1166 (3d Cir. 1978). The court below, however, found that the appellants' motion for an evidentiary hearing was unsupported by any showing that the records in question ever existed, or, if they did, that they were relevant to the instant case. The only support for the appellants' motion with respect to Marlin's personal records is the bare inference that appellants would draw from the presence of empty, labeled file folders, coupled

with Marlin's alleged "mania" for record-keeping. Appellants presented no evidence tending to show that the file folders were not empty when the government gained possession of them. Furthermore, the trial court, in its opinion in support of its denial of the motion, noted that the allegations of loss or destruction of this evidence "are little more than suppositions and speculation based entirely on hearsay statements by unidentified third parties and individuals having no personal knowledge of the alleged destruction of evidence. Significantly, no affidavits have been filed by any of these individuals to support defendants' allegations." Appendix at 105-06 (citations omitted) (footnote omitted).

34. Because appellants failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding, the trial court did not err in denying the motion for an evidentiary hearing.

Presence of Improper or Prejudicial Evidence or Statements Before the Jury; the Jury's Consideration of Appellants' Failure to Testify

35. Appellants seek review of several rulings of the trial court regarding the consideration of certain evidence or statements by the jury. Their first contention is based on a published newspaper interview with a juror. The interview, which took place after the verdict was announced, indicated that the jury had improperly considered and discussed the appellants' failure to testify.

36. The trial court refused to conduct an examination of the jurors to verify the appellants' claim. As the court found, any inquiry into the jury's deliberations would necessarily have violated Fed. R. Evid. 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's

> deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

The inquiry requested by appellants falls squarely within the prohibition of Rule 606(b). Because "extraneous prejudicial information" or "outside influence" were not alleged by appellants, the inquiry would not have fallen within the exceptions to the rule. *See United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979). Therefore, the trial court's refusal to conduct the inquiry will be upheld.[7]

37. Appellants further argue that their convictions must be reversed because documents not admitted into evidence were sent to the jury room. The record reveals that the exhibits in question — G77A and C — had been formally and properly admitted without objection.[8]

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7. United States v. Vento, 533 F.2d 838 (3d Cir. 1976), cited by appellants, is inapposite. An inquiry was conducted in that case for the limited purpose of discovering whether, in fact, extraneous prejudicial information was improperly brought to the jury's attention. 533 F.2d at 869-70.

8. In fact, when the Government sought to continue questioning the custodian of these records, counsel for appellant Jacob Friedland stated: "Your Honor, we object. They're now in evidence. The jury can have them. They speak for themselves." Trial Transcript at 1865-66. The record also shows that the clerk announced the receipt of the exhibits in evidence. *Id.* at 1865.

These exhibits included certain financial records of the appellants.

38. Subsequent to admission of these exhibits, the trial court made a ruling excluding certain categories of evidence; the exhibits in question apparently fell into one of the excluded categories. However, no mention was made of exhibits G77A and C at the time of this ruling, and neither the Government nor the defense moved to withdraw them from the jury's consideration. Furthermore, although counsel were afforded ample opportunity to examine all evidence before it was finally submitted to the jury, no objections were made to the submission of these exhibits.[9]

39. Under Fed. R. Crim. P. 51, a party is ordinarily barred from asserting error unless the party "makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." If the exhibits were not intended by the court or the parties to remain in evidence, or were not actually admitted into evidence, appellants cannot now object to their presence in the jury room unless they can show that the court committed "plain error." Fed. R. Crim. P. 52(b).

40. When exhibits not in evidence reach the jury, a new trial should not be ordered unless it is shown that the evidence was so prejudicial that the defendant was denied a fair trial. *United States v. Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975); *see also United States v. Stoehr*, 196 F.2d 276, 283 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952). The expenditures revealed in exhibits G77A and C were inconsequential when compared with those re-

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9. In the instant case, the defense counsel were given the opportunity to examine the exhibits before the exhibits were sent to the jury room. In general, the defendant should not be allowed to speculate by letting error go unremarked while then seeking a new trial on the basis of an unfavorable verdict. 3 Wright, *Federal Practice and Procedure* (Criminal) §842, at 342 (1969).

vealed in the remainder of the evidence. We cannot say that the trial court committed "plain error" in finding that the presence of exhibits G77A and C in the jury room did not prejudice the appellants.

41. Appellants also contend that evidence showing that they had a secret Swiss bank account should not have been admitted. Appellants concede that this evidence was relevant to the tax fraud counts in the indictment; however, they argued at trial for severance of these counts because of the prejudicial effect this evidence might have with respect to the remainder of the counts.

42. The trial court denied appellants' motion for severance of the tax fraud counts. It did so because it accepted the Government's argument that the Swiss bank account evidence was relevant to the conspiracy count, Count 1. The Government contended that the appellants had discussed the bank account with Barry Marlin as part of a plan for the distribution of proceeds during future loans to be made from the pension fund. The Government further contended that the revelation of the secret account tended to show a close relationship between appellants and Marlin which supported the conspiracy charge.

43. Under Fed. R. Evid. 401, evidence concerning the appellants' disclosure of the existence of their secret Swiss bank account to Marlin was relevant to prove the conspiracy charged in Count 1. Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Marlin's familiarity with the secret account supports his testimony that appellants had discussed with him their plan to use the account to effectuate future schemes in-

volving pension plan funds. It also tends to show, as the Government contended it would, a close association between appellants and Marlin which supports the conspiracy conviction.

44. Because the evidence concerning the Swiss account was relevant, the only remaining question is whether the evidence should have been excluded under Fed. R. Evid. 403, on the ground that "its probative value [was] substantially outweighed by the danger of unfair prejudice. . . ." The trial court's ruling that exclusion was not warranted should be affirmed unless it was arbitrary or irrational. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). The record shows that the trial court carefully considered whether the evidence was sufficiently prejudicial to justify its exclusion, and that the court concluded that it was not. The court's finding was certainly not arbitrary or irrational, and therefore it must be upheld.

45. Finally, appellants contend that certain remarks made by the Government in its opening were so prejudicial as to require reversal. The Government made reference to appellants' "fleecing" of the pension fund, to appellants' "extravagant lifestyle," and to appellants' duty to protect the fund.

46. Even if these remarks are construed as inaccurate or improper, reversal is appropriate only when defendants are prejudiced by the alleged improprieties. *United States v. Somers*, 496 F.2d 723, 737 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). The trial judge is in the best position to weigh the significance of challenged statements in the context of the entire case, to assess the impact of the statements upon the jury, and to determine what remedy, if any, is appropriate. The trial court should be given broad discretion to control the opening remarks. *Cf. Herring v. New York*, 422 U.S. 853, 862 (1975) (trial court given broad discretion to control closing remarks); *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d

Cir. 1978) (same). The trial court carefully supervised all phases of the trial, including the opening; we cannot say that he abused his discretion in finding these remarks unprejudicial.

Count 5: The Obstruction of Justice Charge

47. Count 5 of the indictment charged appellants with violating 18 U.S.C. §1503, which provides in relevant part:

> Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Count 5 charged that appellants

> did corruptly endeavor to influence, obstruct and impede the due administration of justice in that the defendants endeavored to cause Kate Edelman to render false and misleading testimony before a duly empanelled United States Grand Jury. . . .

Appendix at 34. Appellants urge reversal of their conviction under Count 5 on two grounds: (1) the indictment does not meet this circuit's specificity requirements in false statements cases, and (2) Kate Edelman was not a "witness" within the meaning of §1503.

48. In support of their first contention, appellants cite this court's decisions in *United States v. Slawik*, 548 F.2d 75 (3d Cir. 1977), and *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978). Each of these cases involved a challenge to an indictment under 18 U.S.C. §1623, which provides in part:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United

> States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Because materiality and falsity are expressly included as elements of an offense under §1623, this court imposed a requirement of specificity in the indictment:

> We find the same prosecutorial deficiency which undermined the *Slawik* conviction — the failure to specifically allege in the indictment the precise falsehoods charged — exists here.

Tonelli, 577 F.2d at 196.

49. Appellants contend that the same specificity requirement should be imposed on an indictment under 18 U.S.C. §1503. We cannot agree. Although the method employed by appellants in violating §1503 consisted of an attempt "to cause Kate Edelman to render false and misleading testimony," this case is not thereby transformed into a "false statements case," as appellants contend. Rather, it is an obstruction of justice case. Materiality and falsity are *not* elements of the crime charged here.

50. We conclude that an indictment under §1503 for endeavoring to obstruct justice, which is based upon an attempt to induce the rendering of false testimony, need not satisfy the specificity requirements imposed by *Slawik* and *Tonelli* for a §1623 violation.[10]

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10. Appellants also make what is essentially a variance claim. They note that, in response to an order of the trial court, the Government supplied the following as the false statements which appellants encouraged Kate Edelman to make:

> She saw a suitcase with $750,000 in it which Barry Marlin was taking to his bank in the Cayman Islands; whatever was left of the money after Marlin made a deposit, he was taking to the Bahamas to buy an apartment close to David Friedland's apartment.

Appendix at 192. At trial, the court found the evidence insufficient to sustain a §1503 conviction except as to the allegation that appel-

51. Appellants' second contention is that Kate Edelman was not a "witness" within the meaning of §1503. While this may be true, it is entirely irrelevant. Appellants were charged and convicted under a portion of §1503 which, unlike the other provisions of §1503, does not include any reference to a "witness." Rejecting a claim identical to that advanced by appellants, the court in *Falk v. United States*, 370 F.2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967), stated:

> [T]he defendant . . . was not charged with influencing a 'witness' within the first provision of Section 1503. [He] was charged with endeavoring to influence, obstruct or impede the due administration of justice. The means of so doing was by attempting to corruptly influence prospective witnesses. It is clear that in the mind of the defendant, they were prospective witnesses. If he had thought otherwise, there would have been no reason to ask [them] to testify falsely. So, while the term 'witness' may be a

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lants solicited the statement regarding Marlin's stated intent to buy an apartment close to David Friedland's. Thus, appellants argue, they may have been *convicted* for soliciting the statement regarding the apartment, while having been *indicted* by the grand jury for soliciting the other statements supplied by the Government.

We need not determine whether this constitutes variance to conclude that it is not, in any event, fatal variance:

> The federal courts have scrapped the old rule condemning every variance between indictment and proof, and convictions are not now set aside except for variance resulting in substantial prejudice to defendant.

Jackson v. United States, 359 F.2d 260, 263 (D.C. Cir.), *cert. denied*, 385 U.S. 877 (1966). In the instant case we can discern *no* prejudice to appellants resulting from the events they allege as variance. As explained in the text, the indictment was sufficient on its face to charge a violation of §1503. The Government, by subsequently supplying the false statements upon which the indictment was based, placed appellants on notice as to what charges they would have to defend themselves against. *See* United States v. *Izzi*, 613 F.2d 1205, 1210-11 (1st Cir.), *cert. denied*, 446 U.S. 940 (1980).

> word of art in an indictment under the first portion of Section 1503, the phrase 'prospective witnesses' is descriptive only of the intended status of [those whom the defendant attempted to influence] when the Indictment charges obstruction of justice.

370 F.2d at 476. We agree with the *Falk* court in concluding that solicitation of false testimony from a prospective witness may provide the basis for a conviction under the obstruction of justice provision of §1503. In the instant case, Kate Edelman was unquestionably a prospective witness in the minds of defendants when they asked her to testify falsely.[11] As a result, their conduct fell squarely within that portion of 18 U.S.C. §1503 under which they were charged.[12]

The Motion For A New Trial

52. After the jury verdict, appellants moved for a new trial under Fed. R. Crim. P. 33, which provides in relevant part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice.

Appellants contend that the verdict against them is unjust because it rests upon the testimony of Barry Marlin. Because appellants believe Marlin's testimony was not credible, they contend that the trial court should have granted a new trial "in the interest of justice."

53. The denial of the motion for a new trial will be upheld so long as the trial court did not abuse its discretion or fail to exercise it. *United States v. Iannelli*, 528

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11. When appellants suggested that Edelman make the statements involved, she stated that she had not been contacted by the authorities. Appellants responded: "But you will." Trial Transcript at 1929.

12. Because we find that Edelman was a prospective witness under *Falk*, we need not confront the question whether appellants could have been convicted under the obstruction of justice provision were Edelman *not* a prospective witness.

F.2d 1290, 1292 (3d Cir. 1976). The record reveals that the trial court carefully considered the evidence in the case before reaching its conclusion. The trial court expressly recognized its power to consider the credibility of Government witnesses, specifically Marlin. Appendix at 572-75. Nevertheless, the court found Marlin sufficiently competent to allow the jury to decide whether or not he should be believed.[13] We cannot say that it was an abuse of discretion to defer to the jury in this case, in which ample evidence on the issue of Marlin's credibility was placed before the jury.[14]

54. Moreover, the record reveals that the trial court did not end its inquiry after accepting the jury's determination of Marlin's credibility. The court found significant corroborating evidence on the record.[15] In sum, the court carefully satisfied itself that, given the evidence in the record, including the credibility of witnesses, an injustice had not been committed as a result of the jury's

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13. In denying the motion for a new trial, the trial court stated: "Criminal cases, and this one is no exception, usually are fought on the battlefield of credibility. . . . A witness such as Marlin is not incompetent to be a witness." Appendix at 574.

14. Responding to a credibility challenge similar to that of appellants, the Supreme Court, in Glasser v. United States, 315 U.S. 60 (1942), stated: "The short answer to this is that the credibility of a witness is a question for the jury." *Id.* at 77.

15. In support of its denial of appellants' motion for a new trial, the trial court stated:

> . . . I must part company with the defendants when they claim that Marlin is not corroborated. . . . He was corroborated principally by the testimony of Kate Edelman, Fred Otash and Max Cohen. There is also significant corroboration contained in the great mass of documentary evidence introduced.
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> * * *
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> In short, although I recognize that there can be most legitimate question concerning Marlin's credibility, those questions were fully explored and presented issues for the jury. I cannot say on the record of this case that a miscarriage of justice occurred and I do not believe that judicial interference with the verdicts is warranted.

Appendix at 575-76.

verdict. We conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

Barry Marlin's Credibility

55. Appellants grounded their attack in this appeal upon Marlin's lack of credibility. Appellants' briefs commence with an "Introductory Statement," quoting at length the trial court's characterization of Marlin as, among other things, a "gargantuan thief."[16] The briefs are replete with quotations in which the trial court expressed its opinion that Marlin was an unsavory character who was not believable. Apparently, the appellants would have us overturn the verdict based upon our reading of the trial court's assessment of Marlin's credibility, despite the trial court's finding that Marlin was a competent witness.[17] This we cannot do.

56. The issue of Marlin's credibility was amply tested at trial. Both judge and jury heard and saw Barry Marlin testify at great length. Marlin was subjected to vigorous cross-examination by experienced counsel. Marlin's testimony on cross-examination alone occupies over 700 pages in the record. Nevertheless, although the jury could have refused to believe Marlin's testimony, it obviously decided not to do so. And, although the trial court could have granted appellants' motion for a new trial, after a consideration of the credibility issue it decided not to do so. In this appeal, the main thrust of appellants' argument is directed against Marlin's testimony. Appellants would have us make a credibility judgment different from that made by the trial court and jury. We decline.

57. The judgment of the district court will be affirmed.

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16. Brief for Jacob Friedland at 4; incorporated by reference in Brief for David Friedland at 2.

17. *See* note 13 *supra*.

ADAMS, *Circuit Judge*, concurring.

This case presents several troubling aspects. Much of the evidence in support of the convictions here consists of testimony by Barry Marlin, a witness who the district court indicated was unworthy of belief. Prejudicial testimony regarding the existence of a Swiss bank account in the name of the Friedlands was heard by the jury despite the government's ultimate failure to connect the Swiss bank account to the transactions in question, although such connection was promised by the prosecution at the time the evidence was introduced. Either of these matters might properly have been a basis for a district court decision to grant defendants' motion for a new trial. Furthermore, there appears to be a serious question whether a hearing should have been conducted to determine if some of the documentary evidence had been tampered with in an impermissible manner. Nevertheless, the record is insufficient to support the contention that the district court's refusal to hold a hearing on the possible destruction of evidence or to grant a motion for a new trial was either an abuse of discretion or legal error. Accordingly, I concur in the result reached by the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2052/3

UNITED STATES OF AMERICA,

vs.

FRIEDLAND, DAVID

Appellant in No. 80-2052,

FRIEDLAND, JACOB,

Appellant in No. 80-2053.

(D. C. Criminal No. 79-00346-01 and 02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and SLOVITER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on July 23, 1981.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered June 9, 1980 and July 9, 1980, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

October 1, 1981

Certified as a true copy and issued in lieu of a formal mandate on November 18, 1981.

Test:

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

Denial of Petition for Rehearing by the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2052 and 80-2053

UNITED STATES OF AMERICA,
Appellee,

vs.

DAVID FRIEDLAND,
Appellant in No. 80-2052,

JACOB FRIEDLAND,
Appellant in No. 80-2053.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III,
Judge

Dated: November 10, 1981

APPENDIX D

Opinion of the United States District Court of the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRIMINAL NO. 79-346

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID FRIEDLAND and JACOB FRIEDLAND,
Defendants.

MEANOR, District Judge.

Defendants, David and Jacob Friedland, have moved to dismiss the indictment on the ground that the Government "negligently allowed the destruction of discoverable evidence." Specifically, defendants contend that Barry Marlin, an anticipated prosecution witness and the person from whom defendants allegedly received the "kickbacks" charged in counts 2 and 3 of the indictment in connection with loan transactions involving a pension fund of which defendants were counsel, removed potentially exculpatory material from files stored at the office of California attorney Paul Hittelman. The circumstances sur-

rounding the storage of these documents at Mr. Hittelman's office may be summarized as follows: Barry Marlin was indicted by a federal grand jury in Los Angeles on July 27, 1977 on charges of mail fraud, securities fraud and tax violations arising out of various investment schemes in which he defrauded investors of tens of millions of dollars. During the course of the investigation, the grand jury subpoenaed Marlin's personal financial and business records. Following Marlin's plea of guilty to six counts of the indictment, the presiding judge in the California proceeding[1] apparently ordered the U.S. Attorney's office for the Central District of California to turn the subpoenaed material over to Hittelman, the custodian of the records in bankruptcy proceedings involving Marlin's various business ventures. The records were to be used in civil litigation by investors defrauded by Marlin's schemes.

Following oral argument on January 28, 1980, this court denied defendants' motion for dismissal of the indictment, and ruled that defendants had failed to establish a sufficient factual basis to warrant an evidentiary hearing on the question of whether Barry Marlin had destroyed evidence relevant to the charges contained in the present indictment (Tr. of January 28, 1980 Hearing at 38/1-49/23). On February 8, 1980, defense counsel filed a "Certification" and "Supplemental Certification" which, they argue,[2] provide an adequate foundation to trigger

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[1] The Honorable A. Andrew Hauk, United States District Judge, United States District Court for the Central District of California.

[2] The Certification was filed by Franklin M. Sachs, Esq., attorney for defendant Jacob Friedland. However, the Certification was made on behalf of both defendants.

such a hearing. Following re-argument on February 27, 1980, I allowed the parties additional time to submit memoranda with respect to the issue of the "trigger date" of the Government's obligation to preserve potentially exculpatory material (Tr. of February 27, 1980 Hearing at 89/24-92/18).

It has been held that the failure of the prosecution to preserve potentially exculpatory material may, in certain circumstances, constitute grounds for dismissal of an indictment. *See United States* v. *Pollock*, 417 F.Supp. 1332 (D. Mass. 1976).[3] However, dismissal of an indictment is a severe sanction which should only be imposed where there is a bad faith destruction of evidence by the Government or a complete failure to prescribe adequate procedures to preserve potentially exculpatory material. *United States* v. *Quiovers*, 539 F.2d 744, 746-47 (D.C. Cir. 1976); *United States* v. *Pollock*, *supra*.

Perhaps the leading decision in the area of the loss, or destruction of relevant evidence is *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971) ("*Bryant*" or "*Bryant I*"), where the Court held that the Government must make "'earnest efforts' to preserve crucial materials and to

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[3] In *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162 (2d Cir. 1978), the Court of Appeals for the Third Circuit, in discussing the general obligation of the Government to preserve relevant evidence, stated: "Loss of destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process." *Id.* at 1166.

find them once a discovery request is made." *Id.* at 651.[4] Other circuits have adopted the *Bryant* Court's holding

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[4] In *Bryant*, the Court stated that the lost evidence—a tape recording of conversations between the defendant and an undercover agent—was "absolutely crucial to the question of [the defendant's] guilt or innocence." 439 F. 2d at 648. However, the D.C. Circuit adopted a "pragmatic balancing approach" and upheld the conviction after remand. 448 F.2d 1182 (D.C. Cir. 1971) (*"Bryant II"*). The Court concluded that the strong evidence of guilt adduced at trial and the probable unintelligibility of the tape outweighed the negligence of the federal agent in losing the recording. *Id.* at 1184.

The D.C. Circuit defined the issue presented in *Bryant* as follows:

> It is important to recognize that this is not a case of good faith effort to preserve highly relevant evidence, frustrated only by inadvertent loss. Rather, it is a case of *intentional non-preservation by an investigative official.* On a spectrum between good faith but inadvertent loss and bad faith destruction, Agent Warden's conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the latter end. For, despite the overriding vagueness of Agent Warden's testimony, *there is at the very least a hint of bad faith in the record.* A highly disturbing element of the agent's conduct is his apparent reluctance to let even the United States Attorney's office know that a tape recording had ever been made.
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> * * *
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> At issue, then, are the legal consequences of *intentional non-preservation* by investigative officials of *highly relevant* evidence, colored by clear reluctance even to admit that the evidence ever existed at all.

439 F.2d at 647. (Emphasis added.) However, the Court also indicated that the failure to preserve relevant evidence will not be excused merely because it results from the negligence of a Government officer. *Id.* at 651. *See also United States* v. *Augenblick,* 393 U.S. 348 (1969); *United States* v. *Quiovers,* 539 F.2d 744 (D.C. Cir. 1976) (no public policy would be served by dismissing an indictment where there is no colorable showing of prejudice to the defendant and where no officer or agent of the government has acted deliberately to disadvantage the defendant).

that the Government's failure to take measures to preserve potentially exculpatory material "may deny a defendant due process, and thereby jeopardize otherwise viable convictions." *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162, 1165-66 (3d Cir. 1978) and cases cited therein.[5]

However, in *Bryant*, *Testamark* and the other cases cited by the defendants, the existence *vel non* of the "lost" evidence was never in dispute. Nor was the fact that the evidence was directly relevant to the guilt or innocence of the accused or a defense asserted at trial, and that the evidence had been gathered during the course of an investigation of that particular defendant. Rather, the sole issue confronting the Courts in *Bryant* and *Testamark* was

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[5] However, sanctions have rarely been imposed by these Courts. *See Government of the Virgin Islands* v. *Testamark*, 570 F.2d at 1166 n. 7. In *Testamark*, the defendant was convicted of assault with intent to rape. At trial, Testamark admitted the assault, but defended on the theory that he was so intoxicated that he was unable to form a specific intent to rape. On appeal, defendant argued, *inter alia*, that the Government had deprived him of evidence relevant to his defense of incapacity by allowing a blood sample taken shortly after his arrest to spoil. 570 F.2d at 1164.

Although the Court concluded that the police officer's actions in not refrigerating the sample constituted "gross negligence" and a deviation from departmental procedures, it refused to infer from the mere failure to preserve the evidence that the blood sample would have proved exculpatory. In addition, the Court determined that the evidence presented at trial clearly established the defendant's capacity to form an intent to rape, and held that the "failure to preserve the blood sample was harmless beyond a reasonable doubt." *Id.* at 1167. The Court noted, however: "We need not decide whether, had this error come before the trial court on a motion to suppress evidence at the opening of the trial, the harmless error doctrine would have been applicable. *Id.* n. 12.

whether the Government had made "earnest efforts" to preserve clearly relevant evidence and, if not, what sanctions, if any, should be imposed for its failure to comply with its obligations in this regard. *See also United States* v. *Quiovers,* 539 F.2d at 746-47.

In contrast, in the instant case, defendants speculate about the very existence of some of these documents. They assume that since they have been unable to locate any "notes, diaries or memoranda" concerning the loan from the Local 701 Pension Fund, Marlin must have destroyed records relating to this transaction. (February 7, 1980 Certification at ¶ 5) However, other than the bald assertion that Marlin had a "mania for keeping records," defendants offer no evidence that these documents ever existed, or that Marlin removed any such records from Hittelman's office. Indeed, in the Certification, defense counsel request the opportunity to examine Marlin not only with respect to the alleged destruction of certain records, but also as to the very existence of these documents. (February 7, 1980 Certification at ¶ 13(B))

In paragraph 4 of the Certification, defense counsel claim that the files and boxes stored in Hittelman's office were inventoried in June 1978 and that material which "may have been useful" to the defense "appears to be missing" from those files. Initially, it should be noted that there is a serious question as to whether any such material has, in fact, been removed from the office. By letter dated February 11, 1980, defense counsel informed the court that records which had previously been listed as missing have since been "found." More importantly, defendants fail to supply any evidence that Marlin removed or destroyed any of these allegedly missing documents. The representations of defense counsel are little more

than suppositions and speculation based entirely on hearsay statements by unidentified third parties (*Id.* at ¶ 11) and individuals having no personal knowledge of the alleged destruction of evidence. (*Id.* at ¶ 10) Significantly, no affidavits have been filed by any of these individuals to support defendants' allegations.[6] Moreover, it appears

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[6] Defendants have submitted a photocopy of a "Declaration" filed in the Central District of California in connection with Marlin's Rule 35 motion before Judge Hauk. The declarant, one Dorene B. Wolf, states that Marlin's secretary removed some unspecified documents from the office on April 25, 1979. However, it appears that the documents to which Ms. Wolf refers were private accounting work papers which were removed from the room for review by Mr. Hittelman in connection with the bankruptcy proceedings involving Marlin's various business ventures (Sealed Transcript of May 7, 1979 Proceedings at 71/4-12). Judge Hauk had taken Marlin's Rule 35 motion under submission and had advised Marlin that the Court would entertain a reduction of the sentence if Marlin would cooperate with civil litigants in the various bankruptcy proceedings involving partnerships which he had established as an investment counselor. Marlin had agreed to cooperate in these proceedings, and he was given access to the records stored in Hittelman's office.

During the hearing on Marlin's motion for reduction of sentence, Mr. Hittelman advised the Court that he had conducted an independent investigation of Ms. Wolf's allegations and determined that no such records were missing. (Tr. of May 7, 1979 Hearing on Motion for Reduction of Sentence at 39/4-8. *See also id.* at 37/6-40/13; February 11, 1980 Affidavit of Thomas J. Nolan, Esq. at ¶ 12.)

It should be noted that during the course of his cooperation in the civil litigation, Marlin was incarcerated and would be accompanied to Hittelman's office by U.S. Marshals. There does not appear to be any dispute that subsequent to May 7, 1979, Marlin has not removed or destroyed any records. (*See* February 12, 1980 Affidavit of Michael B. Himmel, Special Attorney, U.S. Department of Justice at ¶12; *see also* February 11, 1980 Affidavit of Thomas J. Nolan, Esq.)

that numerous attorneys, paralegals and clerks have had access to these records in connection with the civil litigation arising out of Marlin's various fraudulent schemes.[7] *See* note 6, *supra.*

There is another reason for denying the relief requested by the defendants. Defendants can only speculate on the exculpatory nature of the records which they say "appear to be missing" from Hittelman's office, and on the relevance of any such material to the offenses charged in the present indictment or the defenses which may be asserted at trial.[8] *Cf. United States* v. *Wander,* 601 F.2d 1251, 1263 (3d Cir. 1979) (regardless of whether Government made earnest efforts to preserve evidence, defendants failed to demonstrate that lost photographs and tapes were material to their guilt or innocence, or relevant to

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[7] Defendants do not contend that any of the individuals involved in the civil litigation removed or destroyed any documents. Rather, the thrust of their argument is that Marlin destroyed records which may have been useful to their defense. However, even assuming that persons associated with the civil litigation removed documents from the office at a time when the Government was under an obligation to preserve such records for the defense in the present proceeding, under the unique circumstances of this case, I do not believe that dismissal of the indictment would be required. *See United States* v. *Quiovers,* 539 F.2d at 747 (totality of circumstances surrounding loss of evidence must be examined to determine what sanctions, if any, should be applied).

[8] Defendants contend that Marlin's personal financial and business records may be used, *inter alia,* to impeach his credibility at trial. (Tr. of January 28, 1980 Hearing at 23/12-15; 39/3-10; 42/12-17) However, defendants certainly cannot claim that they have been afforded inadequate materials with which to impeach Marlin.

their defense); *United States* v. *Quiovers*, 539 F.2d 744, 748 (D.C. Cir. 1976) (failure to preserve tape recording of telephone conversation between defendant and undercover agent did not require dismissal of indictment where it was uncertain that recording even contained a reference to the transaction for which defendant was charged or that recording would have significantly assisted the defense); *Armstrong* v. *Collier*, 536 F.2d 72, 77-79 (5th Cir. 1976) (affirming denial of federal habeas relief where State made earnest efforts to preserve prosecutor's file and to locate it for use in habeas proceeding, where petitioner failed to demonstrate that anything contained in the file would have been useful to his defense at trial and where there was no allegation of bad faith on the part of the State). I recognize the logical force of the contention that it is impossible to determine the exculpatory nature of "lost" evidence without knowing the contents of the missing material. I am also mindful of the *Bryant* Court's observation that the duty of preservation extends to evidence which "might" prove "favorable" to the accused. 439 F.2d at 641, 652 n. 21. However, in *Bryant*, although there was uncertainty as to the exculpatory or inculpatory nature of the lost evidence and the probable effect that the material would have had on the jury, it was clear that the tape recording "provided direct evidence on the issue of guilt or innocence." 439 F.2d at 649 n. 12. *See id.* at 647 (evidence "highly relevant"); 648 (evidence "absolutely crucial to the question of appellants' guilt or innocence"). Similarly, in *Testamark* and the other cases cited by defendants, the evidence was relevant to the guilt or innocence of the accused or a defense which was asserted at trial.

There is one final distinction between the circumstances of the instant case and the factual situations presented

in *Bryant* and its progeny. In the cases cited by the defendants, the Government had failed to preserve relevant evidence for use by the defense in the subsequent prosecution of the individual whom the Government was investigating when it obtained the material. In contrast, in the instant case, the allegedly missing records were gathered during an investigation of Barry Marlin, not the defendants.[9] Defendants argue, however, that specific information concerning the charges contained in the present indictment came to the attention of federal officials in California at least as early as November 9, 1977.[10] It is their contention that they were the targets of an investigation on that date, and that the Government's obligation to preserve potentially exculpatory evidence ac-

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[9] I do not mean to suggest that the Government has no obligation to preserve relevant evidence unless the material is gathered during the course of an investigation of a particular suspect. Rather, this discussion is provided to demonstrate the unique circumstances surrounding the acquisition of the information by the Government and its subsequent transfer to Hittelman for use in the bankruptcy proceedings.

[10] Defendants base their contention on a November 11, 1977 FBI memorandum in which it is revealed that Marlin's attorney, in an apparent attempt to obtain a noncustodial sentence for his client on the California indictment, informed a Special Agent of the FBI that Marlin could testify and provide corroborating evidence that the Friedlands received payments "in excess of $200,000 in 1975" in connection with the loan transactions forming the bases of the charges contained in the present indictment. In addition, Marlin's attorney indicated that his client could provide information implicating the Friedlands in other illegal loans involving the Local 701 Pension Fund. The memorandum reveals that Marlin's attorney was speaking "hypothetically." It should be noted that these discussions were initiated by the FBI.

crued upon receipt of this information from Marlin's attorney. Defendants request an evidentiary hearing, if necessary, to determine the nature and scope of any further investigation conducted by federal officials subsequent to November 1977. In reply, the Government urges that the "trigger date" for its duty to preserve relevant evidence can be no earlier than May 7, 1979 when, in a deposition taken by federal authorities in California, Marlin first provided details of the alleged kickback scheme and defendants' involvement therein.

In light of my conclusion that defendants have failed to establish a sufficient factual basis to trigger an evidentiary hearing with respect to the alleged removal or destruction of discoverable evidence, I need not reach the question of the "trigger date" of the Government's obligation to preserve such material.[11] However, a brief discus-

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[11] By letter dated February 12, 1980, the Government informed defense counsel that copies of certain records obtained in the Cayman Islands during the investigation of Barry Marlin had been "routinely discarded" by a Postal Service Inspector following Marlin's sentencing in April 1978. These documents included records of the First Kensington Bank and correspondence concerning the $3.5 million loan between the Local 701 Pension Fund and the Dunhill Brown Corp. Defendants contend that there is "no longer any question in this case as to whether in fact relevant evidence . . . has been destroyed," and urge the court to determine the date on which the Government's duty to preserve such material accrued. (*See* February 28, 1980 and March 11, 1980 Letter Memoranda of Defendants; *see also* February 7, 1980 Certification at ¶ 7.)

However, by letter dated February 14, 1980 and in a letter memorandum dated March 4, 1980 the Government informed defense counsel that copies of these records were in the possession of Frank Petromalo, Jr., Esq., special counsel to the Local 701 Pension Fund, and were immediately available to the defense.

sion of this issue is in order. I am well aware of the *Bryant* Court's observation that "[t]oo often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages," 439 F.2d at 644, and its conclusion that "[o]nly if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." *Id.* at 651. However, I also recognize, and the Government has confirmed, that federal officials frequently receive uncorroborated reports of criminal activity on the part of individuals and simply file the information. As I stated at argument, the fact that government officials in California may have obtained information concerning the offenses charged in the present indictment, and defendants' alleged participation therein, as a result of hearsay statements made by Marlin's attorney while discussing the feasibility of a plea agreement on behalf of his client, without more, would not necessarily mark the commencement of an investigation of these defendants so as to give rise to an obligation on the part of the Government under *Bryant* to preserve discoverable evidence.[12]

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[12] Defendants contend that certain internal memoranda of the SEC, copies of which have not been provided to the court, demonstrate that the SEC had initiated an investigation of the transactions forming the subject matter of the offenses charged in the present indictment as early as June 1976. The Government argues, however, that information gathered by the SEC was turned over to the U.S. Attorney's Office in California and resulted in the indictment of Barry Marlin, discussed *supra*. Contrary to the assertions of defense counsel (February 28, 1980 Letter Memorandum at 5, ¶ 4), although A. Stone Douglas of the Unicorn Group was examined by the SEC with respect to his relation-

(Footnote continued on following page)

Appendix D

Based on the foregoing discussion, defendants' motion for dismissal of the indictment is denied. In addition, defendants have failed to establish a sufficient factual basis to trigger an evidentiary hearing on the alleged destruction of evidence by Barry Marlin. The principles established in *Bryant, Testamark* and the other cases cited by defendants were not intended to operate as discovery devices whereby criminal defendants could obtain pretrial disclosure of evidence that they would not otherwise be entitled to under existing decisional law, *see, e.g., United States* v. *Agurs,* 427 U.S. 97 (1976); *Giglio* v. *United States,* 405 U.S. 150 (1972); *Brady* v. *Maryland,* 373 U.S. 83 (1963), statutory provisions, *see* 18 U.S.C. § 3500, and federal rules, *see* F.R.Cr.P. 16. Rather, cases dealing with the question of the loss or destruction of discoverable evidence represent a logical extension of the principles announced in *Brady* and subsequent Supreme Court decisions to the effect that the suppression of certain evidence may corrupt the truth seeking function of the trial and thereby deprive a criminal defendant of his right to due process of law.[13] Before a federal

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(Footnote continued from preceding page)

ship with defendant David Friedland, it does not appear that the SEC inquired as to whether defendant David Friedland received a "payment" in connection with the $3.5 million loan transaction involving the Local 701 Pension Fund and the Dunhill Brown Corp. (*See* Exhibit B of March 4, 1980 Affidavit of Michael B. Himmel, Special Attorney, United States Department of Justice.)

[13] "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland,* 373 U.S. at 87.

district court should be required to conduct an evidentiary hearing on this issue—and allow defense counsel to cross-examine a key prosecution witness with respect to the existence of and/or destruction of various records,"[14] and federal prosecutors and investigators regarding the nature and scope of their investigations—defendants must provide an adequate foundation to trigger such a hearing. For the reasons discussed *supra,* they have failed to do so.

This conclusion, of course, in no way affects the Government's continuing obligation to provide the defense with "*Brady* material." As I stated at oral argument: "The Government has an obligation to produce Brady material, period. It's their obligation not mine initially. . . . I just remind the Government, when in doubt either bring it to me or turn it over." Tr. of January 28, 1980 Hearing at 30/12-24. The court will enter an order.

DATED: March 25, 1980

[14] February 7, 1980 Certification at ¶ 13(B).